

Bill Memo

SB 347 – Revise the Private Property Assessment Act

Sponsor: Sen. Bob Lake

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Bill Purpose:

By amending the Private Property Assessment Act, Section 2-10-101 et seq., MCA ("PPAA"), this proposal seeks to increase government accountability, reduce uncompensated taking or damaging of private property, and reduce the risk of inadvertent burdens on the public in creating liability for the government. The primary amendments to the PPAA are new sections requiring oversight by interested parties; creating a right for private property owners to bring a lawsuit to invalidate a state agency's action when that agency takes action without performing or completing an impact assessment, as required under the PPAA; and providing definitions that more clearly cover regulatory takings under Montana constitutional and statutory law.

Under the PPAA, state agencies are required to pre-evaluate their actions through impact assessments, which track attorney general guidelines, for the purpose of preventing unnecessary taking or damaging impacts on private property. However, there is no mechanism for property owners to obtain relief if a state agency fails to perform, or inadequately performs, an impact assessment. There is also no mechanism for public participation and oversight. Evidence and past experience reveals that because of the lack of accountability and oversight mechanisms in the PPAA, state agencies tend to go through the motions of filling out the checklist provided by the attorney general's office, but do not perform meaningful impact assessments. The possibility of consequences and oversight is likely to restore the PPAA to its original purpose—as a private property protection measure, rather than an ineffective bureaucratic procedure. As amended, the PPAA should encourage government decision-makers to evaluate more carefully the effects of their administrative and regulatory actions on constitutionally protected rights in property, and should create more responsible fiscal management.

Amending the PPAA is also important to complement SB 344, the proposed "Montana Property Fairness Act" to amend Title 70. SB 344 is a comprehensive regulatory takings bill founded on principles that the legislature should give effect to provisions of the Montana constitution and statutory law that protect the people's fundamental rights to possess, use and sell private property; provide for just compensation when private property is taken or damaged for public use; and provide a remedy separate from eminent domain law. Most notably, SB 344 defines a taking or damaging action as one that would result in the diminution in fair market value of private property by at least 10 percent; this concept is mirrored in the amended PPAA. Making the PPAA more consistent with the tenets of SB 344, and requiring the attorney general to update PPAA guidelines based on new statutory law, helps protect private property owners' constitutional rights. Therefore, the bill memo for SB 344 should be read in conjunction with this bill memo for a better understanding of the coordinated purposes and drafting of the two bills.

Analysis by Section

Section 1. Section 2-10-102, MCA, is amended to read:

"2-10-102. Purpose. ~~It is the policy of this state that~~ Under the Montana and United States constitutions, a person may not be deprived of the use of private property without due process of law and ~~that private property may not be taken or damaged by a state agency without prior just compensation to the owner in accordance with the meaning ascribed to these concepts by the United States supreme court and the Montana supreme court.~~ An assessment of each state agency action with taking or damaging implications is needed to

avoid imposing expensive litigation burdens on citizens and to minimize the risk of unanticipated demands on the state's fiscal resources. The purpose of this part is to establish an orderly and consistent process, subject to public scrutiny, that better enables state agencies to evaluate whether an action with taking or damaging implications might result in the taking or damaging of private property; to reduce the risk of inadvertent burdens on the public in creating liability for the government; to increase accountability and public participation; and to provide private property owners with a private cause of action to invalidate a state agency action with taking or damaging implications if the agency fails to comply with the procedures of this part. It is not the purpose of this part to expand or diminish the private property protections provided in the federal and state constitutions and Montana statutes."

Rationale:

This amendment removes the requirement that the term "taking or damaging" found in Article II, Section 29 of the Montana Constitution be interpreted with reference to decisions of the U.S. and Montana Supreme Courts. The reason for this amendment is that the Montana Constitution is more protective of private property than the U.S. Constitution, and the term "taking or damaging," as well as the coordinated private property protection provisions found in Sections 3, 4 and 17 of Article II, were rendered meaningless by a majority of the Montana Supreme Court in the "elk farm" cases. This amendment gives effect to the dissenting justices' vehement oppositions in those cases.

Further, if SB 344 passes, a statutory definition of "taking or damaging" will be enacted. See Bill Memo for SB 344 for further explanation. Even if SB 344 does not pass, however, private property rights would be better protected if the PPAA does not expressly limit its interpretation of "taking or damaging" to the Montana Supreme Court's jurisprudence.

This amendment also outlines the ways in which it puts "teeth" into the Act, through public oversight and a private landowner cause of action.

Section 2. Section 2-10-103, MCA, is amended to read:

"2-10-103. Definitions. As used in this part, the following definitions apply:

(1) (a) "Action with taking or damaging implications" means a proposed state agency administrative rule, policy, or permit condition or denial pertaining to land or water management or to some other environmental matter that if adopted and enforced would constitute a deprivation of private property in violation of the United States or Montana constitution. It does not include:

—(a) proposed eminent domain proceedings;

—(b) a proposed seizure of property by law enforcement officials as evidence or under a state forfeiture statute;

—(c) a proposed forfeiture of property during or as a result of criminal proceedings; or

—(d) a proposal to repeal a rule, discontinue a government program, or implement a proposed change that has the effect of reducing regulation of private property an administrative or regulatory action of a state agency, including any rule, resolution, guideline, policy, action on an application or permit, or similar measure, that if adopted, acted upon, or enforced by a state agency would cause a taking or damaging.

(b) The following do not constitute an action with taking or damaging implications:

(i) actions of a state agency that were taken before [the effective date of this act];

(ii) actions of a state agency against property that is lawfully determined to be a private or public nuisance;

(iii) actions of a state agency that are required by federal law;

(iv) actions of a state agency that limit the location or operation of property for the purpose of housing sex offenders, selling illegal drugs, selling medical marijuana, or liquor control or property related to adult-oriented businesses such as pornography, obscenity, or nude and topless dancing;

(v) actions of a state agency that establish locations for utility facilities;

(vi) a state agency's formal exercise of eminent domain involving real property;

(vii) a seizure of property by law enforcement officials as evidence or under a state forfeiture statute or a forfeiture of property during or as a result of a criminal proceeding;

(viii) the discontinuance of a state agency action; or

(ix) actions of a state agency that:

(A) are taken in response to a real and substantial threat to public health and safety;

(B) can be verified as addressing a real and substantial threat; and

(C) do not impose a greater burden than is necessary to address the real and substantial threat.

(2) "Fair market value" means the prices estimated in terms of money, of private property that a willing buyer would pay a willing seller after considering all factors in the marketplace that influence the price of private property, including the highest and best use of the property.

(2) "Private property" means:

(a) all any real property, including but not limited to water rights interests protected under the fifth and fourteenth amendments to the United States constitution and Article II, sections 3, 4, 17, and 29, of the Montana constitution; and

(b) any personal property interests described in 70-1-104.

(3) "State agency" means ~~an officer, a state~~ board, commission, council, department, or other entity ~~within the executive branch of state government~~ created by constitution or statute that independently exercises governmental authority, except for those exercising the powers of the United States or any of its agencies through a formal delegation of federal authority. For the purposes of this section, a state agency does not include a regional, county, municipal, or other local government entity.

(4) "Taking or damaging" means ~~depriving a property owner of private property in a manner requiring compensation under the 5th and 14th amendments to the constitution of the United States or Article II, section 29, of the Montana constitution~~ action by a state agency that:

(a) affects an owner's private property, in whole or in part, temporarily or permanently, in a manner that restricts or limits the owner's right to possess, use, modify, develop, sell, or otherwise freely transfer the property; and

(b) causes a diminution in fair market value of the affected property of at least 10%."

Rationale:

This amendment serves the purposes described in the previous section. The amendment takes a broad view of the kinds of state agency actions that are subject to the statute, similar to what is drafted in SB 344. The amendment also removes language defining certain terms in a way that conflicts with the purpose of the amendments to the PPAA and with the definitions drafted in SB 344; those terms are redefined. Finally, it revises the list of exceptions, based on the carefully drafted list of exceptions set forth in SB 344.

This amendment also invokes a common and reliable measure used by real estate appraisers and courts to appraise the value of property, as drafted in SB 344.

This amendment takes a broad, but supportable and logical, view of the definition of "private property," as drafted in SB 344. First, consistent with the overall purpose of the amendments to the PPAA, it defines private property with reference to the coordinated private property protection sections of Article II of the Montana Constitution. Second, Montana statutory law already treats many categories of personal and intangible property as property rights instead of mere privileges. In the "elk farm" cases, the Montana Supreme Court majority ignored that statutory law and declined to treat alternative game farm licenses as protected property rights—although it did acknowledge that under certain factual scenarios, licenses could be protected property rights. This amendment seeks to give effect to the broad intent of Section 70-1-104, MCA and the dissenting opinions in the elk farm cases.

Unlike the equivalent definition in SB 344, which covers every level of government actors, this amendment intends to maintain the PPAA's existing limitation to actors at the state level. If the PPAA were to apply to

local and municipal government agencies, we would likely have to amend Title 7 to accomplish that, as Title 2 is reserved for state government.

Section 3. Section 2-10-104, MCA, is amended to read:

"2-10-104. Guidelines for actions with taking or damaging implications. (1) The attorney general shall develop and provide to state agencies guidelines, including a checklist, to assist the agencies in identifying and evaluating agency actions with taking or damaging implications. The attorney general shall at least annually review the guidelines and modify them as necessary to comply with changes in statutes and court decisions.

(2) In developing guidelines, the attorney general shall include a provision that state agencies should consider and follow obligations imposed by ~~the 5th and 14th amendments to the Constitution of the United States and Article II, section 29, of the Montana constitution, as construed by the United States supreme court and the Montana supreme court,~~ Article II, sections 3, 4, 17, and 29, of the Montana constitution and by Montana statutes when considering and implementing an action with taking or damaging implications in order to avoid infringing constitutionally protected private property rights and causing unanticipated and undue burdens on the state treasury."

Rationale:

These amendments intend to import the purpose and definitional changes in the amended PPAA, as set forth in the proposed amendments to Sections 2-10-102 and 2-10-103, into the attorney general's guidelines.

Section 4. Section 2-10-105, MCA, is amended to read:

"2-10-105. Impact assessment. (1) Each state agency shall assign a qualified person or persons in the state agency the duty and authority to ensure that the state agency complies with this part. Each state agency action with taking or damaging implications must be submitted to that person or persons for review and completion of an impact assessment. The state agency ~~may not take the action unless the review and impact assessment have been completed, except that the action with taking or damaging implications may be taken before the review and impact assessment are completed if necessary to avoid an immediate threat to public health or safety~~ shall complete the impact assessment prior to enactment into rule or public dissemination of any rule, program, resolution, guideline, policy, or other similar measure and shall provide notice to the public and interested persons as required under [section 5].

(2) Using the attorney general's guidelines and checklist, the qualified person shall prepare a written taking or damaging impact assessment for each state agency action with taking or damaging implications that includes an analysis of at least the following:

(a) the likelihood that a state or federal court would hold that the action is a taking or damaging the action will cause a taking or damaging of private property by depriving the owner of economically viable use of the property, resulting in a temporary or permanent physical invasion of the property, or causing a diminution in fair market value of all or part of the property;

(b) alternatives to the action that would fulfill the agency's statutory or regulatory obligations and at the same time reduce the risk for a taking or damaging; and

(c) the estimated cost of any financial just compensation by the state agency to one or more persons property owners that might would be caused required by the action and the source for payment of the compensation.

(3) A copy of the complete impact assessment for a proposed action with taking or damaging implications must be given to the governor before the action is taken, except that an action to avoid an immediate threat to public health or safety may be taken before the impact assessment is completed and the assessment may be reported to the governor after the action is taken file must be maintained and made available to the public at the state agency's offices during regular business hours.

(4) The proposed action may be taken before the impact assessment is completed or before complete notification to the public and interested persons as required under [section 5] only if necessary to avoid a real and substantial threat to public health or safety.

(5) If an action is taken before the impact assessment is completed or before complete notification is provided to the public or interested persons due to a real and substantial threat to public health or safety, the state agency shall complete the impact assessment immediately after the action is taken, but in no case more than 20 days after the action is taken, and shall provide notice to the public and interested persons in accordance with [section 5] immediately after the impact assessment is completed, but in no case more than 10 days after the impact assessment is completed. The notice required under [section 5] must additionally include a specific summary of the real and substantial threat that justified taking the action."

Rationale:

This amendment removes language that instructs state agencies to rely on court decisions to determine whether an action has taking or damaging implications, instead referring agencies to definitional concepts, as drafted in SB 344 and supported by Article II, Section 29 of the Montana Constitution. This amendment also removes the requirement that state agencies submit impact assessments to the governor, instead requiring them to submit to interested parties, even when action is taken before the impact is assessed. Moreover, the amendment ensures that when such action precedes an assessment, it must be for a "real and substantial," rather than an "immediate," threat to public health or safety. This reflects narrowly drawn language in one of the exceptions to taking or damaging actions found in the amendments to the PPAA and in SB 344.

Finally, this amendment takes into account that certain agency actions, such as guidelines and policies, do not constitute rulemaking procedures. In those instances, the amendment requires impact assessments be performed before the action is publicly disseminated.

NEW SECTION. Section 5. Notice to public and interested persons. (1) After an impact assessment has been completed, and regardless of the findings in the assessment, the state agency that performed the impact assessment shall provide notice to the public and interested persons of its intent to engage in the proposed action. The notice must be provided through use of electronic e-mail lists and postal mail lists to all persons who have elected to be notified of impact assessments and through the use of a common website used by all state agencies.

(a) The electronic e-mail lists and postal mail lists must be established to allow interested persons to be on lists notifying them of impact assessments of all state agencies or of specific information based on agency name or geographical location of a proposed action and may provide notice based on other criteria that would promote public awareness of proposed actions.

(b) The website must be created to allow access to impact assessments of all state agencies or to specific information based on agency name or geographical location of a proposed action and may also be based on other criteria that would promote public awareness of proposed actions. The website must provide a summary of the impact assessment and a link to a source for the complete impact assessment.

(2) If due to time constraints a state agency is compelled to take an action allowed by this part before completion of an impact assessment, it shall, within 3 days of learning of the requirement to take the action, post notice of the action and provide a brief explanation of the action, the need for expedited action, and an estimate of when the action will be completed and the expected availability of the completed summary and impact statement.

(3) Unless the action may be taken without a completed impact statement as provided in this part, the state agency may not take the proposed action until it has completed and posted the impact statement.

(4) The state agency shall update the assessment and provide notice to the public if the action is not adopted before the 180th day after the date the original notice was given.

Rationale:

This amendment gives “teeth” to the PPAA by requiring public oversight of the impact assessment process, in that interested parties may now review completed assessments and monitor the actions of state agencies that may have an impact on the value of their property. Using the mechanism of interested parties is not unprecedented; the attorney general keeps a list to which he sends out any new AG opinions, and each state agency has a list to which it forwards proposed rules. Requiring that an agency forward its assessment to a list of interested parties is cost-effective and would accomplish public oversight and participation.

NEW SECTION. Section 6. Suit to invalidate state agency action. (1) A state agency's adopted action is not valid unless the action was taken in compliance with [section 5]. A private property owner affected by a state agency action taken without fulfilling the requirements of [section 5] may bring suit for a declaration of invalidity of the action.

(2) A suit under this section must be filed in a court in the county in which the property owner's affected property is located. If the affected property is located in more than one county, the property owner may file suit in any county in which the affected property is located.

(3) The court shall award a property owner who prevails in a suit under this section reasonable and necessary attorney fees and court costs.

Rationale:

This amendment also gives “teeth” to the PPAA by empowering private property owners with a cause of action when a state agency fails to comply with the requirements of the Act—namely, to complete an impact assessment and to provide notice to interested parties.

NEW SECTION. Section 7. Liberal interpretation -- cumulative remedy. (1) The provisions of [this act] are to be liberally construed to effectuate the intent, policies, and purpose of this act.

(2) The cause of action and remedy created by [this act] are cumulative to Montana eminent domain law and any other remedy provided by the laws and constitution of this state or the United States. [This act] may not be construed as limiting any other laws or remedies protecting private property rights. In the event of a conflict of laws, the law providing the greatest protection of private property rights must prevail.

Rationale:

Subsection (2) of this amendment is important, as it clarifies that the new cause of action provided under the PPAA is cumulative to the remedies available under eminent domain law and, if it passes, SB 344.